

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HIMED DELI CORPORATION AND</b>	:	DETERMINATION
<b>TAHER M. HIMED AND ABDO M. HIMED</b>	:	DTA No. 814493
<b>AS OFFICERS</b>	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the Period June 1, 1990	:	
through May 31, 1994.	:	

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Petitioners, Himed Deli Corporation and Taher M. Himed and Abdo M. Himed, as officers, 545 2nd Avenue, New York, New York 10016, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1990 through May 31, 1994.

A hearing was held before Daniel J. Ranalli, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 17, 1996 at 12:00 p.m., which date began the six-month period for the issuance of this determination. Petitioners appeared by John B. Graziadei, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina Seifert, Esq., of counsel).

***ISSUE***

Whether petitioners timely protested notices of determination issued by the Division of Taxation entitling them to a hearing on the merits of their petition.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") conducted an audit of two grocery stores owned and operated by petitioners Taher M. Himed and Abdo M. Himed, one located at 441 Third Avenue, New York City, and the other located at 545 Second Avenue in New York City. Petitioners are brothers who run the stores as a single family business. They were advised to form a corporation to operate their business and did so, but the corporation was later dissolved.

It is not known whether the corporation was in existence during the audit period, but it had been dissolved by the time of the hearing. The grocery stores were operated as Himed Deli or Himed Food Stores.

2. As a result of the audit, the Division issued the following notices of determination of sales and use taxes due to petitioners:

<u>Petitioner</u>	<u>Notice Number</u>	<u>Date of Notice</u>
Himed Deli Corp. Abdo M. & Taher M.	L 010061123	February 9, 1995
Himed	L 010061124	February 9, 1995
Taher Himed	L 010069292	February 21, 1995
Abdo M. Himed	L 010069293	February 21, 1995

3. The Division acknowledges that petitioner Taher M. Himed filed a timely request for a conciliation conference and a petition for a hearing protesting the Notice of Determination, dated February 21, 1995, issued to him (L 010069292). Accordingly, that notice is not the subject of this determination.

4. Acting on behalf of Himed Food Stores, petitioners' accountant, Abdo M. Gaisi, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS"). The request was received by BCMS on May 22, 1995 in an envelope bearing a United States Postal Service postmark of May 18, 1995. Certified mail receipts (United States Postal Service forms 3800 and 3811) establish that this request for conference was mailed to the Division by certified mail on May 18, 1995. The request references one taxpayer, Himed Deli Corp., and one assessment identification number, L 010061123. No mention is made on this document of Taher Himed, Abdo Himed or the notices of determination issued to them (L 010061124, L 010069292).

5. BCMS issued a Conciliation Order Dismissing Request, dated July 14, 1995, to Himed Deli Corp. It states:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on February 9, 1995, but the request was not mailed until May 18, 1995, or in excess of 90 days, the request is late filed.

"The request filed for a Conciliation Conference is denied."

6. If, as the Division claims, the notice issued to Himed Deli Corp. was mailed on February 9, 1995, an application for a conference in BCMS or a petition for a hearing was required to be filed no later than May 10, 1995. The Notice of Determination issued to Himed Deli Corp. includes a boldface paragraph stating:

"THE TAX HAS BEEN ESTIMATED IN ACCORDANCE WITH PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH A HEARING PROCESS BY FILING A REQUEST FOR A CONCILIATION CONFERENCE OR A PETITION FOR A TAX APPEALS HEARING BY 5/10/95."

7. A copy of the request for conference mailed to the Division in Albany, New York, was also mailed to the Division's Brooklyn office addressed to the attention of the auditor who conducted the audit. It too was mailed by certified mail on May 18, 1995.

8. Petitioners Abdo and Taher Himed mailed a second document to BCMS in an envelope bearing a United States Postal Service postmark of June 8, 1995. This document is a Division form (DTF-968.1), entitled a Payment Document, referencing assessment number L 010061124. Petitioners used the Payment Document to inform the Division that Abdo M. Himed had appointed his brother Taher Himed to represent him in all matters involving the audit of Himed Deli. At hearing, it was explained that Abdo M. Taher spent much of his time in the country of his origin, Yemen, and in his absence left the running of the two grocery stores to his brother.

9. BCMS treated the Payment Document as a request for a conciliation conference regarding the assessment issued to Abdo M. and Taher M. Himed (L 010061124). It issued a Conciliation Order, dated August 18, 1995, dismissing the request on the ground that it was not mailed to BCMS within 90 days of the issuance of the statutory notice. The Conciliation Order states that the notice was issued on February 5, 1995, but the notice of determination in question is dated February 9, 1995.

10. On October 24, 1995, the Division of Tax Appeals received a petition captioned "Taher Himed" challenging assessments L01001123-3, L010061124, L01006292-3 and L010069293-2. Attached to the petition, along with other documents, was a Notice of

Determination, number L010069293, issued to Abdo M. Himed and dated February 21, 1995.

There is no evidence that petitioners previously filed a request for a conciliation conference or a petition with respect to this notice.

11. In an answer to the petition, the Division asserted that petitioners are not entitled to a hearing on the merits of their claims because they failed to file requests for conciliation conferences or petitions within 90 days of the mailing of the three statutory notices.

12. To establish the fact and date of the mailing of the notices of determination to petitioners, the Division submitted two affidavits from Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit (CARTS is an acronym for Case and Resource Tracking System and refers to the Division's computer system for generating statutory notices, among other things); two affidavits from Daniel LaFar, a Principal Mail and Supply Clerk; and two certified mail records.

13. Ms. Mahon states that she supervises the processing of notices of deficiency and notices of determination before they are shipped to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Assessments Receivable, Certified Record for Non-Presort Mail, which the Division refers to as its "certified mail record" ("CMR"). The statutory notices listed on the CMR and generated by CARTS are also forwarded to Ms. Mahon's unit. When it is received by Ms. Mahon, the CMR bears the date on which it was printed on the top left-hand corner of each page. The notices to be mailed are assigned a certified mail control number which appears on the notice and in a column of the CMR headed "CERTIFIED NO". The notices to be mailed are listed in a second column under the heading "NOTICE NUMBER". The notice numbers on the CMR correspond to the assessment identification numbers shown on each notice. This information is followed by the name of the addressee and the address to which the notice is being mailed. Each statutory notice is placed in an envelope by Division personnel.

14. The Division submitted a photocopy of the CMR on which the notices of determination issued to Himed Deli Corp. and to Abdo M. Himed and Taher M. Himed on

February 9, 1995 are listed. The CMR was printed with the date January 31, 1995 in the upper left-hand corner of each page. On the first page, that date was crossed out, and the date February 9, 1995 was handwritten in its place. Ms. Mahon states that the CMR is ordinarily printed approximately 10 days in advance of the anticipated date of mailing of the notices. The handwritten change in the date is made by Division personnel to conform to the actual date that the CMR and the notices are delivered to the possession of the United States Postal Service.

15. Ms. Mahon asserts that the original CMR consists of 24 fan-folded (connected pages) and that all pages of a CMR are connected when the document is delivered to the possession of United States Postal Service. The pages remain connected when the document is returned to Ms. Mahon's office after mailing of the notices, and they stay connected unless she requests that the pages be separated.

16. The certified mail control numbers on the copy of the CMR entered in evidence run consecutively from P 911 204 654 to P 911 204 914. The pages are numbered consecutively from one to twenty-four. Each page of the 24-page document bears a United States Postal Service date stamp of February 9, 1995.

17. Page four of the subject CMR shows an article of certified mail, certified number P 911 204 689 addressed to Himed Deli Corp., 545 2 Ave, New York, NY 10016-6329. Also listed is an item of mail, certified number P 911 204 690, addressed to Abdo M. Himed & Taher M. Himed at the same address as the Deli. The certified mail and notice numbers on the CMR correspond to the numbers shown on the notices of determination issued to Himed Deli Corp. and to Abdo M. Himed and Taher M. Himed.

18. In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

19. In his two affidavits, Mr. LaFar describes the Division's ordinary procedure for delivering outgoing mail to the United States Postal Service.

20. After receipt of the CMR and notices, a member of Mr. LaFar's staff counts the envelopes and verifies the names and certified mail numbers on the notices against the

information contained in the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one.

21. Mr. LaFar states that a member of his staff delivers the CMR and the envelopes to the Colonie Center Branch of the United States Postal Service where a postal employee affixes a postmark and/or his or her signature to the CMR indicating receipt by the Postal Service.

22. On the CMR under discussion, a United States Postal Service date stamp of February 9, 1995 appears on each page, including the last page of the CMR. At the bottom of the CMR, the following statement is printed: "TOTAL PIECES AND AMOUNTS LISTED 261". The number "261" has been crossed out, and the number "259" has been handwritten below it. The last line of the CMR states: "TOTAL PIECES RECEIVED AT POST OFFICE". No information has been entered on the document next to this line. There are no signatures or initials on this page.

23. In his affidavit, Mr. LaFar explained the change in the number of items listed on the CMR. He states that the number "261" reflects the number of items originally listed on the CMR. Lines drawn through two items, appearing on pages 14 and 23 of the CMR, indicate that two pieces of mail were pulled from the mailing. According to Mr. LaFar the total number of pieces listed was then changed to reflect the actual number of pieces delivered to the Postal Service.

24. After its delivery, the CMR is left in the custody of the United States Postal Service. It is normally picked up by a member of the Mail Processing Center staff on the day following delivery and returned to the originating office. The CMR is the Division's record of receipt by the United States Postal Service of pieces of certified mail.

25. Regarding the notice issued to Abdo M. Himed (L010069293) on February 21, 1995, the Division offered proof which was similar to that previously described in connection with the statutory notices issued on February 9, 1996. The Mahon and LaFar affidavits detail the Division's standard mailing procedure as described above, and that information need not be repeated except where the procedures differ.

26. The Division offered in evidence a copy of a 19-page CMR which contains information regarding the mailing of a notice of determination to Abdo M. Himar. The certified numbers on the CMR run consecutively from P 911 205 727 through P 911 205 931, and the pages are numbered from one through nineteen. Each page is dated February 8, 1995, but on the first page of the CMR, that date has been crossed out and the date February 21, 1995 handwritten in its place. The reverse side of each page of the original CMR bears a United States Postal Service date stamp of February 21, 1995. This fact was verified by the Administrative Law Judge who reviewed the original copy of the CMR before a copy was substituted for it.

27. Page one of the subject CMR shows an article of certified mail, certified number P 911 205 736 addressed to Himed-Abdo M., 441 3rd Ave, New York, NY 10016-6030. The notice number is shown as L 010069293. The certified mail and notice numbers on the CMR correspond to the numbers shown on the Notice of Determination issued to Abdo M. Himed.

28. On the CMR entered in evidence, a United States Postal Service date stamp of February 21, 1995 appears on the bottom of the last page. A signature appears above the postmark. The last line of the CMR states: "TOTAL PIECES RECEIVED AT POST OFFICE". No information has been entered on the document next to this line. The line above it states: "TOTAL PIECES AND AMOUNTS LISTED 205". The number "205" has been circled. With reference to these entries, Mr. LaFar states:

"Here, the postal employee affixed a Postmark to the back of every page of the certified mail record and the front and back of the last page of the mail record to indicate that this was the total number of pieces received at the Post Office . . . . My knowledge that the postal employee circled the 'total number of pieces' for the purposes of indicating that 205 pieces were received at the Post Office is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record" (Exhibit H, ¶ 6).

### ***CONCLUSIONS OF LAW***

A. A petition contesting a notice of determination of sales and use taxes due must be filed within 90 days after the giving of notice of such determination (Tax Law § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (see, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (Matter of Roland, Tax Appeals Tribunal, February 22, 1996).

When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the fact and date of mailing of the notice that triggered the statutory time period (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service for mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). The act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioning Sales & Serv., *supra*). A properly completed Postal Service Form 3877, reflecting Postal Service receipt of the items listed on the form, represents direct documentary evidence of the date and fact of mailing (Matter of Air Flex Custom Furniture, *supra*; see also, Coleman v. Commr., 94 TC 82; Wheat v. Commr., 63 TCM [CCH] 2955). The CMR used by the Division contains most of the significant elements of the Postal Service Form 3877 and serves the same purpose (Matter of Brager, Tax Appeals Tribunal, May 9, 1996).

B. Here, the affidavits of Geraldine Mahon and Daniel LaFar describe a standard procedure for the mailing of notices of determination. Copies of the certified mail records were offered in evidence to establish that the procedures described in the affidavits were actually followed. However, that evidence was not sufficient to establish the actual date of mailing of



the notices of determination issued to Himed Deli Corp. and to Abdo M. and Taher M. Himed (L01006123 and L01006124).

The decisions of the Tax Appeals Tribunal consistently hold that the presumption of regularity that attaches to acts of a governmental agency only arises if the certified mail record is both complete and completed in accordance with the standard procedure described by the Division's affiants (see, Matter of Brager, supra). The CMR listing the notices of determination issued to Himed Deli Corp. and to Abdo M. Himed and Taher M. Himed provides a space for the postal employee to write the number of pieces actually received, and this space was left blank. Thus, the CMR, on its face, appears to be incomplete. Moreover, the Tribunal has held that the failure of the postal clerk to indicate the number of pieces received for mailing renders the certified mail record incomplete, even where a postmark appears on some or all of the pages of the certified mail record (see, Matter of Roland, supra; Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Auto Parts Ctr., Tax Appeals Tribunal, February 9, 1995). In the affidavit submitted with this CMR, Mr. LaFar does not address this omission. However, in the affidavit executed in connection with the notice issued to Abdo M. Himed, Mr. LaFar states that his office "specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record". Based on all of the evidence, the certified mail record listing notices mailed on February 9, 1995 is incomplete and, therefore, cannot serve as proof of the actual date of mailing of the notices listed on it. Although the Division's proof was insufficient to show the exact date of mailing of the notices of determination (L 010061123 and L 010061124), the evidence shows (and petitioners concede) that petitioners received the notices of determination. Accordingly, petitioners' request for a conciliation conference must be deemed timely (see, Matter of Green Valley Liquors, Tax Appeals Tribunal, November 25, 1992).

C. The result is different with respect to the notice issued to Abdo M. Himed, dated February 21, 1995 (L 010069293). Through the Mahon and LaFar affidavits, the Division

established that it has a standard procedure for mailing notices of determination and described that procedure in some detail. The CMR lists the item of mail sent to petitioner Abdo M. Himed, and the last page of the CMR contains the signature of a postal service employee who circled the number of pieces received by the Postal Service in accordance with the standard procedure described by the LaFar affidavit. Thus, the CMR is adequate to show that the standard procedure was followed in this case and that the notice was actually mailed on February 21, 1995. Since a petition for hearing was not filed until October 24, 1995, the Division of Tax Appeals has no jurisdiction over the notice.

D. The petition of Himed Deli Corp. and Taher M. Himed and Abdo M. Himed is granted to the extent that a hearing will be scheduled on the merits of the petition as it applies to notice numbers L 010061123 and L 010061124.

The petition of Abdo M. Himed challenging notice number L 010069293 is dismissed with prejudice.

DATED: Troy, New York  
December 26, 1996

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE